LAZARUS & ASSOCIATES
ATTORNEYS AT LAW

1025 THOMAS JEFFERSON STREET, N.W., SUITE 110G
WASHINGTON, D.C. 20007
WEBSITE: KENNETHLAZARUS.COM

KENNETH A. LAZARUS
(LAZARUSLAW@AOL.COM)

TEL: (202) 295-2330 (DIRECT)
FAX: (202) 298-6355

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Peter G. McCabe, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference
of the United States
Thurgood Marshall Federal Judiciary Bldg.
Washington, D.C. 20544

Re: Proposed Amendments to Rule 45

Dear Mr. McCabe:

This letter is submitted in response to the Committee's request for comment on the proposed amendments to Rule 45 of the Federal Rules of Civil Procedure. It is submitted on behalf of the American Medical Association and a number of related physician organizations, including the American Osteopathic Association, the American Congress of Obstetricians and Gynecologists, the Medical Group Management Association, the American Association of Neurological Surgeons, the American Academy of Dermatology, and the Physician Insurers Association of America.

Physicians are often caught up in litigation as non-parties, primarily in state courts, of course, but, on occasion, in federal courts as well. [1]/ Normally, such litigation involves physician and/or hospital medical liability and hospital negligent credentialing claims. Typically, subpoenas issued to non-party physicians call for the production of medical or other practice-related documents and deposition testimony relating to patient health or the past performance of a physician caught up in a lawsuit. Very frequently, such subpoenas are pure "fishing expeditions," following up on a casual reference to the subpoena recipient in a previous deposition or document production and the information

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[1]/ Physician organizations follow Federal Rule developments because of their direct impact on federal litigation but also because they influence substantially the development of state rule formulations.

sought is very often privileged, inadmissible, and/or irrelevant.

Evidentiary privileges and patient privacy rights often control document and testimonial demands that are made upon non-party physicians. Although the Federal Rules of Evidence do not provide any physician-related privileges, many, perhaps most, states have enacted statutory privileges covering physician-patient communications that are applicable in diversity cases. *See* Rule 501 of the Federal Rules of Evidence. An evidentiary "peer-review" privilege is also recognized by many states to protect systems by which committees of physicians review the work of a colleague to evaluate compliance with relevant medical standards, normally in a hospital setting. *See, e.g.,* Ohio Rev. Code § 2305.251. The Health Insurance Portability & Accountability Act of 1996 ("HIPAA," 42 U.S.C. § 1320, *et seq.*) and other federal and state enactments also protect the privacy of patients in ways that can substantially limit access to a broad range of health care information.

Physicians recognize their responsibility to provide information and evidence in support of judicial functions in appropriate circumstances. At the same time, however, inappropriate demands that are made upon them can create substantial burdens on their personal time and also divert them from the pressing needs of their patients. Thus, physicians and their legal counsel rely on all current Rule protections that are available to them and hope to see such protections retained and, where possible, reinforced.

A central goal of the amendments is to simplify, consolidate, and clarify some unnecessarily complicated portions of Rule 45 and related rules, an effort that is clearly worthwhile. It also makes good sense to resolve the split of authority regarding Rule 45's provisions for subpoenaing parties and party officers. *Compare* In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006) (finding authority to compel a remote party officer to travel many hundreds of miles to testify at trial), with Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D.La.2008) (interpreting Rule 45 relevant to distant party officers in accordance with the traditional 100-mile limitation expressly referenced in Rule 45). Substantively, the split is resolved by denying authorization to compel the testimony of distant corporate party officers at trial. We take no position on whether corporate party officers should be made to travel distances greater than 100 miles to testify, but we strongly support the Committee's retention of the 100-mile rule with respect to non-parties, including non-party physicians, who, after all, have no stake whatsoever in the litigation at hand and should not be required to travel long distances for purposes of either deposition or trial.

We were pleased to see that the proposed amendments are generally supportive

of the interests of non-parties. [2]/ However, we do urge your consideration of three proposed changes to the amendments, as follows:

1. Rule 45(a)(4) should be expanded to require notice to opposing parties of subpoenas for deposition testimony, in addition to the proposed "documents only" notice requirement.

2. The rights of subpoena recipients set forth in proposed Rule 45(d) and Rule 45(e)(2)(B) should be enforceable in either the district where compliance is required or in the issuing court, at the option of the third-party recipient.

3. The transfer authority conferred upon the court where compliance is required as set forth in proposed Rule 45(f) should be further limited to require a finding of "exceptional circumstances" and "an absence of substantial inconvenience to the subpoena recipient" or similar standard.

Notice To Cover Depositions

We recognize that the proposed notice provision, limited to "documents only" reflects current law. Nonetheless, there exists no compelling reason to so limit the provision. The physician-patient privilege and patient privacy rights belong to the patient and apply with equal force to document productions and deposition testimony. The same is true with respect to the peer-review privilege which belongs to the physician and the hospital. Normally, the patient as plaintiff or the attending physician or hospital as defendant is a party in the litigation and their interests are fairly met only if they are put on notice of a possible threat to their common-law and/or statutory rights which can arise under both federal and state law, as noted above.

Choice Re Enforcement of Rights

In terms of our parochial interests, we see no need to alter Rule 45's provisions

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[2]/ I participated in the Rule 45 Mini-Conference that was held in Dallas, Texas on October 4, 2010, and attempted to convey the basic concerns of physicians, who, far more than most, get caught up in litigation conducted by others. My basic concerns, as expressed in Dallas, are generally met by the proposed amendments.

with respect to the "issuing court." Current law is entirely satisfactory to us. However, we understand and appreciate the Committee's rationale in proposing that the court where an action is pending issue subpoenas, rather than the court where the discovery is to take place. Yet, at the same time, we urge the Committee to give even greater deference to the needs of non-parties. Certainly, litigants have a right to every man's evidence and certainly, courts should be permitted to function in an efficient manner. In the majority of cases physicians in receipt of a subpoena would much prefer to protect their interests and the interests of others whom they are duty-bound to protect in the district court in which they reside and practice. But, in a limited number of instances it may be more convenient and efficient for the subpoena recipient to challenge the subpoena in the district where the litigation is pending, particularly in instances where a party may also want to contribute argument in support of a privilege or privacy claim at issue in the case. [3]/ Accordingly, we propose that the rights of subpoena recipients be litigable in either the issuing court or in the court where the discovery is to take place, at the recipient's option.

Further Limiting Transfer Authority

In further deference to the rights of subpoena recipients and in keeping with the points raised above, we also respectfully suggest that the judicial authority to transfer a subpoena challenge back to the issuing court from the court where compliance is required, as conferred by proposed Rule 45(f), be exercisable only in exceptional circumstances and where such transfer will not result in any substantial inconvenience to the subpoena recipient.

Closing Note

We take this occasion to thank the Committee, in particular the departing Chair, Judge Lee Rosenthal, for their service and many courtesies. We also wish to congratulate and offer our best wishes for every continued success to the incoming

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[3]/ In this regard, the convenience of, and competing time demands placed upon, physicians, and the potential for tactical mischief inherent in subpoenas seeking their testimony or documents within their possession is, generally speaking, at least the equivalent of those raised with respect to corporate party officers, to whom great deference is paid in the proposed amendments. *See* proposed Rule 45(c).

Rules leadership, Standing Committee Chair, Judge Mark Kravitz, and Rules Advisory Chair, Judge David Campbell.

Your consideration is appreciated.

Respectfully,

Kenneth A. Lazarus

cc: Judge David G. Campbell
Professor Richard Marcus

George E. Cox, Esq., American Medical Association
Liza Assatourians, Esq., American Medical Association
Shawn Martin, American Osteopathic Association
Dr. Albert L. Strunk, Esq., American Congress of Obstetricians & Gynecologists
Amy Nordeng, Medical Group Management Association
Katie Orrico, American Association of Neurological Surgeons
Jennifer Mascho, American Academy of Dermatology
John Hedstrom, American Academy of Dermatology
Michael Stinson, Esq., Physician Insurers Association of America